Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

AARON L. SALVO,

Petitioner,

vs.

UNITED STATES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a person is in custody for *Miranda* purposes when the reason for his detention is to elicit incriminating statements and evidence.

2. Whether a person has been seized within the meaning of the Fourth Amendment even though he is in a "familiar" environment during interrogation.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the Solicitor General of the United States, Nina Goodman, U.S. Department of Justice, Criminal Division; and Nancy Vecchiarelli, Assistant U.S. Attorney, Cleveland, Ohio.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Aaron L. Salvo, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit filed on January 15, 1998.

OPINIONS BELOW

The Opinion from which the instant Petition results was rendered by the United States Court of Appeals for the Sixth Circuit on January 15, 1998 (App 1 through 28) reversing the District Court's suppression on February 27, 1997 of Petitioner's statements and evidence seized in a search of Petitioner's dormitory room. (App 29 through 40).

JURISDICTION

Jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. Section 1254(1), and Rules of the Supreme Court of the United States, Rules 10(a), and 10(c), for the Opinion of the U.S.C. for the Sixth Circuit entered on January 15, 1998.

CONSTITUTIONAL PROVISIONS

FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable

searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTORY PROVISIONS

Title 18 U.S.C. 2252(a)(2)

(a) Any person who –

(2) knowingly receives, or distributes, any visual depiction that has been mailed, or has been shipped or transported in interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means including by computer, or knowingly reproduces any visual depiction for distribution in interstate or foreign commerce

by any means including by computer or through the mails, if –

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

shall be punished as provided in subsection (b) of this section.

Title 18 U.S.C. 2252(a)(4)

(a) Any person who –

(4) either –

(B) knowingly possesses 3 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction that has been mailed, or has been shipped or transported in interstate or foreign commerce, or which was produced using materials which have been mailed or so shipped or transported, by any means including by computer, if –

(i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(ii) such visual depiction is of such conduct;

shall be punished as provided in subsection (b) of this section.

STATEMENT OF THE CASE

A. History

This case was appealed from the United States Court of Appeals for the Sixth Circuit which reversed the order of the United States District Court of the Northern District of Ohio granting Petitioner's motion to suppress statements made and evidence seized from Petitioner's dormitory room at the Ashland University in Ashland, Ohio.

Respondent was indicted on November 8, 1995 in the Northern District of Ohio, on a two (2) count indictment, charging Respondent Aaron L. Salvo with possessing and receiving child pornography, in violation of 18 U.S.C. 2252(a)(4) and (a)(2). Prior to trial, Respondent moved to suppress statements he had made to federal agents and evidence seized during a search of his dormitory room. The district court granted the suppression motion on February 27, 1997. The Government appealed the District Court's ruling to the United States Court of Appeals for the Sixth Circuit which reversed the District Court's order on January 15, 1998.

B. Basis for Federal Jurisdiction

Jurisdiction was based in the United States District Court for the Northern District of Ohio upon 18 U.S.C. Sec. 2252(a)(2) and 18 U.S.C. Sec. 2252(a)(4).

C. Factual History From Suppression Hearing

On October 27, 1995, Aaron L. Salvo (hereafter Respondent) was confronted by Agent J.R. Williamson of the Federal Bureau of Investigation near the front door of his dormitory shortly after 7:30 A.M. He was immediately joined by two (2) other Agents who were assisting. At the suppression hearing, Agent Williamson testified that after identifying himself, that he advised Respondent that he was conducting an investigation and wanted to talk to him. The Respondent testified that the Agent said he was investigating trafficking in child pornography over the internet.

The events that led up to confrontation began on August 8, 1995 when officials at Ashland University contacted the Ashland County Prosecutor who in turn called the Federal Bureau of Investigation about suspicious e-mail messages between Respondent and another individual via the internet. At the time, Respondent just finished his first year at the University and was an eagle scout leader in the Boy Scouts of America at a summer camp.

The subject of the e-mail messages was child pornography and an inquiry of how to start a relationship with a scout at camp. Agent Williamson contacted Barry Norris, a Boy Scout Administrator concerning Respondent's conduct. He determined that the Respondent posed no threat to any scouts at camp and as a result he postponed his investigation until October, 1995. In fact the Agent testified that there was no evidence of a seduction of a scout at camp.

Question: Was any evidence whatsoever presented that a young boy was seduced by Mr. Salvo at the camp?

Answer: No, there was not.

Question: Has there ever been a complaint brought to your attention or the attention of any authorities who may know that in fact a boy was seduced by Mr. Salvo?

Answer: No, there were no complaints.

Agent Williamson next became involved with this case on October 26, 1995 via a phone call from Barry Norris of the Boy Scouts advising him as membership in the Scouts was a privilege and not a right, Respondent was to be removed from scouting the next morning at 7:30 A.M. at Friendly's Restaurant near campus. Agent Williamson testified that he wished to be present to "take any necessary steps in the best interest of the investigation" in the event an attempt was made to destroy evidence. He also testified that his purpose in approaching the Respondent was to elicit incriminating statements.

At the meeting Norris accused the Respondent of lying when he denied any knowledge of improprieties at the camp. After a short exchange he was summarily dismissed from the Scouts. Respondent left the restaurant followed by Agent Williamson who had observed the meeting but did not participate. Agent Williamson testified that Salvo appeared distraught as he followed him towards his dormitory.

After Respondent was stopped by Agent Williamson at the dormitory entrance, Williamson radioed Agents Hayden and Marshall to join them which they did within minutes. It was this point that Respondent testified,

> "I put my head in my hands and got sick to my stomach."

Respondent was asked for a private place to talk and complied by getting a vacant computer room unlocked by a custodian at his dormitory. After questioning for about thirty (30) minutes, the Respondent admitted to possession of child pornography on his computer. During the questioning Salvo testified that he was an emotional wreck and distraught, asking for his life back begging not to go to prison. He was assured by the Agents that they were not talking about prison, that he would probably skate, and that they were there to help him because they felt that he was led astray. At no time before, during or after the questioning in the computer room was Respondent advised of his *Miranda* Rights.

Respondent further testified that he was asked to retrieve a floppy disk with child pornography from his room. He complied because he was assured everything would be okay if he cooperated which he interpreted meant no prison and no criminal prosecution. Subsequent to turning over the disk, the Agents demanded to search his room.

While Agent Williamson testified that there may have been some discussion about search warrants, that Respondent readily consented to a search of his dormitory room and signed the consent to search form after reading the admonitions. Respondent testified that if he

did not consent to a search of his room, the Agents said they could obtain a search warrant and return with uniformed police. Respondent testified that Agent Hayden told him that he (Agent Williamson) meant business and that his room would be searched whether he consented or not. He should let them search "discreetly".

Agent Hayden acknowledged being alone in the computer room with the Respondent, and although not recalling using the words "meant business" he did tell Salvo that they were there for "real purposes" and his cooperation would be appreciated. Respondent testified that he felt that he again had no choice but to sign the consent to search which he did without reading. The Agents subsequently removed the computer from his dormitory room.

Respondent testified that in November he received a call from Agent Williamson stating that he probably would not be prosecuted. However, in February of 1996, Respondent was advised that he would be prosecuted and that it was necessary to be reinterviewed. Although this meeting started out at a Burger King Restaurant next to the dormitory, Agents Williamson and Hayden took Respondent to their vehicle for questioning. At the time Salvo was given images removed from his computer and the disk which he was required to identify and initial. Again without the benefit of receiving any *Miranda* warnings, Respondent testified that he complied with the request because he had no other choice to avoid prison.

REASONS FOR GRANTING THE WRIT

1. The Petition should be granted because the opinion below establishes a hierarchy of circumstances in determining whether a person is in Custody for purposes of Fifth Amendment protection.

2. The Petition should be granted because the opinion below disregards the totality of the circumstances in determining whether a consent to search was voluntary and not influenced by duress and coercion.

I

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW ESTABLISHES A HIERARCHY OF CIRCUMSTANCES IN DETERMINING WHETHER PERSON IS IN CUSTODY FOR PURPOSES OF FIFTH AMENDMENT PROTECTION.

The Fifth Amendment provides that a Defendant in a criminal case cannot be compelled to be a witness against himself. The Supreme Court in *Miranda vs. Arizona*, 384 U.S. 436, 478-479, 86 S.Ct. 1602 (1966) provided that a suspect must first be advised of his rights against self incrimination where he is the subject of a custodial interrogation. As a result of their ruling, incriminating statements obtained from a custodial suspect cannot be used at trial unless the suspect was first advised of his *Miranda* rights. *Stansbury vs. California* 511 U.S. 318, 322, 114 S.Ct. 1526 (1994).

The *Miranda* rule applies to custodial interrogations "initiated by police officers after a person's freedom is deprived in a significant way." *Oregon vs. Mathiason*, 429 U.S. 492, 495, 97 S.Ct. 711 (1997). Custodial interrogation

depends how a "reasonable man in the suspect's position would have understood the situation" after a consideration of the totality of the circumstances. *United States vs. Phillips*, 948 F.2d 241, 247 (6th Circuit, 1991). (Citing *Berkemer vs. McCarty*, 468 U.S. 420, 442 104 S.Ct. 3138 (1985)).

Also, a relevant factor in determining how a reasonable man would understand his situation is whether a reasonable person would have felt free to leave for purposes of a Fifth Amendment custody determination. As stated in *Thompson vs. Keohane*, 516 U.S. 99, 116 S.Ct. 457, 465 (1995) the custody determination hinges upon whether, "given those circumstances, would a reasonable person feel he or she was not at liberty to terminate the interrogation and leave?"

However, after a review of the pertinent law and factors of the totality of the circumstances, the Sixth Circuit Opinion below applied essentially two (2) factors in determining that Respondent was not entitled to *Miranda* warnings, namely familiar environment and freedom of movement. The Court cited a number of cases having to do with police questioning at a residence.

However, if one is to examine the totality of the circumstances pursuant to *Berkemer*, that examination must include the following factors: (1) Respondent was condemned as a liar and is summarily discharged without explanation; (2) he is distraught as he makes his way back to his dorm; (3) he is confronted by three Federal Bureau of Investigation agents about child pornography on the internet and e-mail messages about seduction of young boys; (3) he is given the option to find a private

place to talk to the agents in lieu of public exposure to roommates, and student acquaintances; (4) he becomes sick to his stomach; (5) he begs for his life back and not to go to prison; (6) the agents assure him of favorable treatment if he cooperates; (7) the Agents' purpose of confronting Respondent was to elicit incriminating statements and take steps necessary in the best interest of the investigation; (8) he is threatened with a search warrant with uniformed officers if he would not allow an expanded search of his room; (9) Respondent felt he had no choice but to cooperate unless he wanted to go to prison; (10) Respondent is never advised of his *Miranda* rights. Considering what had transpired, Respondent reasonably believed that he did not have unrestrained freedom to leave even though he went to his room at the agents' request to bring them the disk. The agents had knowledge of the images and had told the Respondent of that fact during the confrontation following Friendly's in the computer room.

The result is the same for both encounters, October 27, 1995 and February 1996. Petitioner is advised to form a support group, talk to lawyer, tell his family. While at the February meeting only two agents are present, Respondent is advised that he will be prosecuted and subsequently winds up in agents' vehicle identifying computer images without being advised of his *Miranda* rights. Again Petitioner stated that he felt that he had no choice but to consent, otherwise he would go to prison.

In conclusion, the Court below considered only two factors rather than a totality of the circumstances in determining whether Respondent was in custody. Clearly, Respondent was entitled to his *Miranda* rights prior to

interrogation. Thus all statements made and evidence obtained as a result of those statements should respectfully be suppressed.

II

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THIS COURT'S PRIOR RULINGS IN DETERMINING A CLEARLY ERRONEOUS STANDARD.

The Fourth Amendment protects citizens against unreasonable searches and seizure. However if a suspect voluntarily consents to a search, the Government bears the burden of proving the consent to be voluntary after examining the totality of the circumstances. *Schneckloth v. Bustamonte*, 412 U.S. 218, 248, 93 S.Ct. 2041 (1993). Further the Government must prove by clear and positive testimony that the consent was unequivocal, and specific, intelligently given and not influenced by any duress or coercion. *U.S. v. Taylor*, 956 F.2d 572, 573 (6th Cir. 1992).

Further where there are two permissible views of the evidence the fact finder's choice between them cannot be "clearly erroneous". *U.S. v. Rose*, 889 F.2d 1490, 1494 (1989), quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 574, 105 S.Ct. at 1504, 1511 (1985). *Accord Hernandez v. New York*, 111 S.Ct. at 1859, 1871, 1872 (1991).

The Court below clearly failed to follow the rule set forth by this Court in determining that the Respondent freely consented to the search of his room. As previously addressed under the Fifth Amendment issue, the District Court had ten (10) factors to consider relative to the determination of a custodial interrogation. These factors

apply in considering whether the Respondent's consent to search was readily given free of any duress or coercion under the totality of the circumstances.

The District Court below found that the Respondent's consent to search was the result of duress and coercion under the totality of the circumstances and as such the evidence seized should be suppressed. This finding was the fact finder's "permissive view" of the evidence and thus its choice cannot be clearly erroneous.

CONCLUSION

In determining whether a person is in a custodial situation for purposes of *Miranda* a court must determine from a totality of the circumstances how a reasonable person perceived his situation. In the same context, a totality of circumstances is applicable to determine whether a person has voluntarily consented to a search free from duress or coercion, unequivocally, and specific and intelligently given. The Court below erred in failing to follow rules enunciated by this Court in determining that the respondent was entitled to *Miranda* admonitions and that his consent to search was voluntary. Thus the United States Court of Appeals For The Sixth Circuit's opinion should be reversed and the United States District

Court For the Northern District of Ohio's suppression order be reinstated.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellant,*	)	
v.	)	No. 97-3214.
AARON L. SALVO, *Defendant-Appellee.*	)	

Appeal from the United States District Court
for the Northern District of Ohio at Cleveland.
No. 96-00352 – Solomon Oliver, Jr., District Judge.

Argued: Aug. 6, 1997.

Decided and Filed: Jan. 15, 1998.

Before: KEITH and SUHRHEINRICH Circuit Judges; ROSEN, District Judge.*

COUNSEL

ARGUED: Nina Goodman, U.S. DEPARTMENT OF JUSTICE, CRIMINAL DIVISION, Washington, D.C., for Appellant. George Glavinos, Jr., Westlake, Ohio, for Appellee. **ON BRIEF:** Nina Goodman, U.S. DEPARTMENT OF JUSTICE, CRIMINAL DIVISION, Washington, D.C., Nancy L. Kelley, Nancy A. Vecchiarelli, OFFICE OF THE U.S. ATTORNEY, Cleveland, Ohio, for Appellant. George Glavinos, Jr., Westlake, Ohio, for Appellee.

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* The Honorable Gerald E. Rosen, United States District Judge for the Eastern District of Michigan, sitting by designation.

OPINION

ROSEN, District Judge.

I. *INTRODUCTION*

On November 6, 1996, a grand jury in the Northern District of Ohio returned a two-count indictment charging Aaron L. Salvo with possessing and receiving child pornography. Defendant Salvo moved to suppress statements he made to FBI agents and evidence obtained during a search of his residence, claiming that the agents held him in custody without first reading him his *Miranda* rights, and that he was coerced into consenting to a search of his residence. After an evidentiary hearing, the District Court ordered both the statements and the seized evidence suppressed. The Government now appeals the District Court's ruling. For the reasons set forth below, we REVERSE.

II. *FACTS*

Defendant Aaron Salvo first came to the attention of law enforcement when officials at Ashland College, where Salvo was a student, discovered several suspicious e-mail messages. In these messages, Salvo, an Eagle Scout who had been a Boy Scout leader, stated he was a lifeguard at a Boy Scout camp and requested advice about how to seduce one of the boys at the camp. Ashland College reported this to the Ashland County Sheriff's Department, who in turn contacted the FBI.

In August of 1995, FBI Special Agent Joseph Williamson contacted Boy Scouts' administrator Barry Norris concerning Salvo's conduct. When Agent Williamson determined that Salvo posed no immediate danger to the boys at the camp, he postponed his investigation until October. Norris later informed Williamson that he would be meeting with Salvo on October 27, 1995 at a Friendly's Restaurant to confront Salvo about the e-mail messages, and to discharge him from the Boy Scouts. Agent Williamson observed the meeting from another table (without identifying himself) because he wanted to "take any necessary steps in the best interest of the investigation" in the event that Salvo attempted to destroy evidence.

Salvo came into the restaurant, where there were about a half-dozen customers, at the agreed upon time of 7:30 a.m. He sat down with Norris, and Norris asked him if he knew about anything strange or unusual happening at the camp. When Salvo replied that he did not know what Norris was talking about, Norris told him to "stop lying" because he knew what was going on. Norris then told Salvo he was discharged from the Boy Scouts and should no longer associate with the group.

After Salvo left the restaurant, Agent Williamson followed him to his dormitory. Upon reaching the dorm, Agent Williamson identified himself to Salvo, told him that he was conducting an investigation, and asked to speak with him. At this point, the testimony of Agent Williamson and Aaron Salvo differ somewhat.

A. Agent Williamson's testimony

According to Agent Williamson, Salvo seemed nervous, but had a fairly normal demeanor. Agent Williamson radioed two other agents who were waiting nearby to assist him. After FBI Special Agents Hayden and Marshall arrived, Agent Williamson asked where they could speak in private, suggesting Salvo's dorm room. However, Salvo replied that his roommate was asleep and he did not want to get anyone else involved. Salvo instead suggested the computer room, which he asked a custodian to unlock.[1] Agent Williamson testified that the agents told Salvo at the beginning of the interview that he was not under arrest, that he was free to leave at any time, and that he did not have to talk to them. Agents Williamson and Hayden questioned Salvo, while Agent Marshall, a probationary agent in training, stood off to the side and took notes. Salvo eventually admitted to possessing child pornography on his computer. Agent Williamson asked if he could search Salvo's room, but Salvo said he did not want to wake his roommate. Instead, Salvo offered to go to his room himself and retrieve the information from his computer.

When Salvo returned with a disk containing some pictures, he volunteered that his roommate was no longer in the room. Agent Williamson again asked to search the room, and Salvo agreed and signed a Consent to Search form.[2] When the agents searched the room, they found

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[1] The computer room is a 15' x 30' room with windows to the outside and the interior of the dorm.

[2] Agent Hayden also testified that Salvo had no objection to the search.

that Salvo had "formatted" his computer hard drive when he returned to his room to retrieve the disk. In doing this, Salvo put the information into a file which was difficult to access by ordinary means. Salvo admitted to the Agents that he had formatted the hard drive, and the computer was taken to FBI headquarters in Washington D.C., where the information on the hard drive was retrieved.

While the agents searched the room, Salvo asked them about the nature and extent of the problems he might be facing. Agent Williamson responded that it was possible that he could face some jail time, but could possibly "skate," or receive no jail time.

Agent Williamson testified that he next met Salvo at a Burger King more than three months later, in February, 1996. Agent Williamson met Salvo inside the Burger King, but told him that it would be more appropriate to discuss matters outside the restaurant. Again, Williamson informed Salvo he was not under arrest, that he would not be placed under arrest at the conclusion of the interview, and that he was free to leave at any time. The two went to Agent Williamson's car, where Agent Williamson showed Salvo the pictures seized from Salvo's computer and told him that he faced prosecution. Agent Williamson then asked Salvo if he had told his parents about what had happened, and Salvo responded that he had not. Williamson recommended that Salvo tell his parents, form a "support group," and consult an attorney.

B. Aaron Salvo's testimony

According to Salvo, when the agents first confronted him with the accusations in October 1995, he put his hands on his head and got sick to his stomach. He said that after they entered the computer room, Agent Williamson confronted him with evidence of the e-mail messages. Another agent said "we think you've been led astray and we are here to help you, find out what's going on." Salvo said he was an emotional wreck and claimed he repeatedly told the agents that he wanted his life back and did not want to go to prison. Agent Hayden said, "whoa, whoa, whoa. Nobody's talking about prison. Don't worry about it." Salvo said the agents replied that they expected him to skate. They then told Salvo to retrieve the photographs on disk, and everything would work out.

After Salvo returned with the disk, Agent Williamson again requested to search the room. Salvo testified that Agent Williamson said, "we can do it discreetly or go to the Courthouse and talk to the Ashland County Prosecutor, get a warrant and be back with uniformed police to conduct the search and he [Salvo] would be excluded from the room."[3] Salvo testified that when the other two agents left the room, Agent Hayden told Salvo that Agent Williamson was not playing games, and would search his room whether Salvo let him or not. Salvo testified that he felt he had no choice, so he signed the consent form. He further said that although he had formatted the hard

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[3] Williamson claims to have told Salvo simply that if he refused to consent, the agents would attempt to obtain a search warrant.

drive, he had offered to retrieve the information once the agents had discovered it.

Salvo testified that in November, 1995, Agent Williamson told him that there would be no prosecution. However, in February, 1996, Agent Williamson called Salvo to tell him that he would be prosecuted, so it would be necessary to have another interview. When Agent Williamson and Salvo met in the Burger King parking lot, Salvo entered the FBI car to examine the pictures taken from his computer.

III. *DISTRICT COURT'S RULING AND ISSUES PRESENTED*

The District Court ruled that Salvo's October 1995 statements to the FBI agents should be suppressed because of the agents' failure to give Salvo his *Miranda* warnings before questioning him. The Court explained its ruling as follows:

> A reasonable person in the suspect's shoes would believe that he was in custody when these statements were made, that he was being accused of committing a crime and was not free to go. This is so even if the Defendant was told that he was free to go and would not be arrested at the end of the interview. Here, the agents had substantial information that this Defendant was engaged in illegal activity and had some evidence of it for [sic] significant period of time – first from the Ashland County Prosecutor and the Ashland County Sheriff and then from Ashland College officials. They coordinated with the Boy Scout leader who terminated him on the morning of October 27, 1995, for conduct related

> to the alleged illegal activity so that they could approach the Defendant immediately after receiving what to him was devastating news. This situation, together with agents telling him that they knew about some of his alleged illegal activity and that he should cooperate with them could lead him to reasonably believe that he was indeed not free to go despite the possible assertions by the officers to the contrary. Their conduct spoke otherwise.

(Joint Appendix, p. 18-19). The District Court ruled likewise regarding the February 1996 interview:

> Here he was told that the Assistant U.S. Attorney would be prosecuting the case. The Defendant was asked to meet with the agents and give another statement. He was also told, according to the agent, things were such that maybe he should get a lawyer to have that person talk with the Assistant U.S. Attorney. A reasonable person in the suspect's situation would, under the totality of the circumstances, feel that he was in custody and was not free to go.

(J.A., p. 19).

The District Court also concluded that the evidence seized during the search October 1995 of Salvo's dormitory room should be suppressed. Although the Court acknowledged that voluntary "consent is possible even in the context of custodial interrogation," it found that in this case "any verbal or written consent was not voluntary." (J.A., p. 19). The Court explained:

> This is based on the facts and circumstances described in the context on whether Defendant was entitled to *Miranda* warnings and on the coercive nature of Agent Hayden's statements to

> the Defendant regarding the fact that Agent Williamson meant business and that they could do it the easy way or the hard way. All of this suggested that his consent was not voluntary but was coerced under threats, veiled or otherwise.

(J.A., p. 19-20).

The Government challenges the District Court's ruling, and presents the following issues in this appeal:

> 1) Whether the District Court erred in ruling that, while being interviewed by FBI agents in the computer room of his dormitory and later at the fast-food restaurant, Salvo was in custody and therefore entitled to *Miranda* warnings; and,
>
> 2) Whether the District Court erred in ruling that Salvo did not voluntarily consent to the search of his dormitory room.

IV. *STANDARD OF REVIEW*

"On suppression issues, we review the District Court's findings of fact for clear error, but we review all conclusions of law *de novo*." *U.S. v. Crowder*, 62 F. 3d 782, 785. (6th Cir. 1995), *cert. denied*, 116 S. Ct. 731 (1996). The issue of whether the defendant was "in custody" is a mixture of law and fact, and is thus reviewed *de novo*. *Thompson v. Keohane*, 516 U.S. 99, 116 S. Ct. 457, 460 (1995). However, "[t]he district court's findings with regard to voluntariness [of consent to search] will not be reversed unless clearly erroneous." *U.S. v. Taylor*, 956 F. 2d 572, 577 (6th Cir.), *cert. denied*, 506 U.S. 952, 113 S.Ct. 404 (1992) (*quoting U.S. v. Rose*, 889 F.2d 358, 360 (6th Cir. 1988)).

V. *ANALYSIS*

A. Custodial Interrogation

The Fifth Amendment provides that a defendant cannot be "compelled in any criminal case to be a witness against himself." Consistent with this right against self incrimination, the Supreme Court's decision in *Miranda v. Arizona*, 384 U.S. 436, 478-479, 86 S.Ct. 1602 (1966), ruled that suspects cannot be subjected to a custodial interrogation until they have been advised of their rights. In order to encourage compliance with this rule, incriminating statements elicited from suspects in custody cannot be admitted at trial unless the suspect was first advised of his or her *Miranda* rights. *Stansbury v. California*, 511 U.S. 318, 322, 114 S.Ct. 1526 (1994).

The *Miranda* rule's application is limited to "custodial interrogations," which the Supreme Court has defined as, "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in a significant way." *Oregon v. Mathiason*, 429 U.S. 492, 495, 97 S.Ct. 711 (1977) (*quoting Miranda*, 384 U.S. at 444). Thus, in order for *Miranda* to apply, the suspect must either be actually taken into custody or the restraint on his freedom must rise to the level associated with a formal arrest. *California v. Beheler*, 463 U.S. 1121, 1125, 103 S.Ct. 3517 (1983). The Supreme Court has distinguished between "custodial interrogation" and the mere questioning of a suspect in a "coercive environment":

> [A] noncustodial situation is not converted to one in which Miranda applies simply because a reviewing court concludes that, even in the

> absence of any formal arrest or restraint on freedom of movement, the questioning took place in a "coercive environment." Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime. But police officers are not required to administer Miranda warnings to everyone whom they question.

Mathiason, 429 U.S. at 495. *See also, United States v. Phillip*, 948 F.2d 241, 247 (6th Cir. 1991), *cert. denied*, 504 U.S. 930, 112 S.Ct. 1994 (1992) ("Coercive environments not rising to the level of formal arrest . . . do not constitute custody within the meaning of *Miranda*."); *United States v. Knox*, 839 F.2d 285, 291-292 (6th Cir. 1988), *cert. denied*, 490 U.S. 1019, 109 S.Ct. 1742 (1989).

In applying Supreme Court precedent to questions of whether a defendant was "in custody" for *Miranda* purposes, the Courts of Appeals have relied on a totality of circumstances approach to determine "how a reasonable man in the suspects's [sic] position would nave understood the situation." *Phillip*, 948 F.2d at 247 (*citing Berkemer v. McCarty*, 468 U.S. 420, 442, 104 S.Ct. 3138 (1985)). *See also, United States v. Griffin*, 922 F.2d 1343, 1348-49 (8th Cir. 1990); *United States v. Howard*, 991 F.2d 195, 200 (5th Cir.), *cert. denied*, 510 U.S. 949, 114 S.Ct. 395 (1993). In fact, some judicial applications of this objective test specifically include an inquiry into whether a reasonable person in the suspect's position would have felt "free to leave." *See, e.g., United States v. Booth*, 669 F.2d 1231, 1235 (9th Cir. 1981) ("Based upon a review of all the

pertinent facts, the court must determine whether a reasonable person in such circumstances would conclude that after brief questioning he or she would not be free to leave"); *United States v. Jones*, 933 F.2d 807, 810 (10th Cir. 1991) (court affirmed trial court's determination that a reasonable person would not have felt free to leave under the circumstances); *United States v. Hocking*, 860 F.2d 769, 773 (7th Cir. 1988) (partially reversed on other grounds) (in determining whether the accused was subject to custodial interrogation, the court should consider the totality of the circumstances, including the accused's freedom to leave the scene).

These cases undermine the Government's contention that the District Court utilized the wrong test by basing part of its ruling on its conclusion that a reasonable person in Salvo's position would not have believed he was "free to go." In making its argument, the Government relies upon *Berkemer v. McCarty*, 468 U.S. 420, 427, 104 S.Ct. 3138 (1984), in which the Court held that although stopping an automobile is a "seizure" under the Fourth Amendment, the occupants are not necessarily "in custody" for the purposes of the Fifth Amendment.

The distinction between these two tests is apparent in the Sixth Circuit's opinion in *United States v. Knox*, 839 F.2d 285, 289-291 (6th Cir. 1988), in which this Court used different tests for the Fourth Amendment and Fifth Amendment inquiries. With respect to the Fourth Amendment seizure test, the *Knox* Court relied upon the Supreme Court's decision in *United States v. Mendenhall*, 446 U.S. 54, 554, 100 S.Ct. 1870 (1980), which identified a "seizure" as occurring at that point in time when, "in view of all of the circumstances surrounding the incident,

a reasonable person would have believed that he was not free to leave." With respect to the Fifth Amendment test, the *Knox* Court stated: "The test is an objective one: would a reasonable person in the defendant's position have felt that he was under arrest or was "otherwise deprived of his freedom of action in a significant way." " (*citing Miranda,* 384 U.S. at 477)).

However, despite the distinctions between the Fourth and Fifth Amendment tests drawn in *Berkemer* and *Knox,* we still do not believe that these cases, even taken together, definitively establish a rule for all cases that Fifth Amendment custody determinations may not include a "free to leave" component. Several factors lead us to this conclusion.

As an initial matter, we note that both *Berkemer* and *Knox* involved brief detentions of a *Terry* stop nature. (*Berkemer* involved a traffic stop and *Knox* an airport stop-and-question). From this, the Government argues that because the suspects in these cases were not free to leave upon being stopped, but were nevertheless not entitled to *Miranda* warnings, that we should extrapolate a general proposition that the free to leave test does not apply to Fifth Amendment custody determinations. The problem with this analysis is that because both of these cases were *Terry* stop situations, the question of whether the suspects were free to leave simply did not enter into the custody determination analysis. This is so because the transitory nature of a *Terry* stop itself indicates that a suspect is not free to leave during that brief period of detention. Thus, because of the very cursory and limited nature of a *Terry* stop, a suspect is not free to leave, yet is not entitled to full custody *Miranda* rights.

However, this does not equate to a broader application of this rule to detentions of a more lengthy, substantive nature. In non-transitory, more protracted interrogation situations, the question of whether a reasonable person would feel free to leave obviously becomes more pertinent to a determination of whether the suspect is in custody for purposes of Fifth Amendment protection.

A further indication that there may be a "free to leave" aspect to Fifth Amendment custody determinations can be found in the Supreme Court's recent decision in *Thompson v. Keohane*, 516 U.S. 99, 116 S.Ct. 457, 465 (1995), a jurisdictional habeas corpus case, in which the Court stated that the custody determination hinges upon whether, "given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave." This language, although not a central holding of the case, indicates that the "free to leave" inquiry is at least a component of a Fifth Amendment custody determination (presumably with the exception of a *Terry* stop situation).

Finally, the broad language employed by the Sixth Circuit in *Phillip* – how a "reasonable man" would have "understood the situation" – clearly leaves open the possibility of a "free to leave" component to a custody inquiry, i.e., did the suspect "understand his situation" to be one in which he was not free to leave.

In short, the Government's assertion that the District Court erred in applying a "free to leave" test is not supported by the case law, which although perhaps not clear as to an exact formulation of a test, at least does not

preclude a "free to leave" inquiry. Suffice it to say here, that for the purposes of a Fifth Amendment custody inquiry, we believe that courts may consider, as one component or aspect of the totality of the circumstances under which the suspect is questioned, whether a reasonable person in the suspect's position would have felt free to leave. We stress that this is not necessarily an ultimate or even dispositive inquiry; only that courts, in considering whether a suspect is "in custody" for the purposes of triggering the Fifth Amendment protections, may inquire as to whether a reasonable person in that suspect's particular circumstances would have felt free to leave. In other words, this is one permissible inquiry, among others, which courts may consider in making Fifth Amendment custody determinations. Thus, here, in utilizing a "free to leave" test in making its custody determination, the District Court did not necessarily err as a matter of law.

Having said this, however, we now turn to the question of whether the circumstances presented here support the District Court's ultimate finding of a "custodial interrogation" to which *Miranda* protections apply. We find they do not, and that its conclusion that a reasonable person in Mr. Salvo's circumstances would not have felt free to leave is simply not supported by either pertinent precedent or the clearly established undisputed facts of this case.

We begin our analysis with a survey of the pertinent appellate precedent. In applying the totality of the circumstances approach, several Courts of Appeals have found that when police question a suspect in a residence, these circumstances often do not rise to the kind of custodial situation that necessitates *Miranda* warnings,

whether they are free to leave or not. *United States v. Howard*, 991 F.2d 195, 200 (5th Cir.), *cert. denied*, 510 U.S. 949, 114 S.Ct. 395 (1993) (no custody when questioning occurred at defendant's home and he was told he was not under arrest, although told to "stay put"); *United States v. Gregory*, 891 F.2d 732, 735 (9th Cir. 1989) (no custody when suspect consented to brief interview in home with wife present, and agents returned guns to their holsters); *Krantz v. Briggs*, 983 F.2d 961, 962 (9th Cir. 1993), overruled on other grounds, (*Miranda* warnings not required when officers went to suspect's girlfriend's home, and suspect voluntarily invited them inside and agreed to talk); *Devier v. Zant*, 3 F.3d 1445, 1458 (11th Cir. 1993) (*Miranda* warnings not required when defendant questioned at home without *Miranda* warnings and then volunteered to continue questioning at station), *cert. denied*, 471 U.S. 1009, 115 S.Ct. 1125 (1995).

In these cases, the factors that courts have relied upon include: (1) the purpose of the questioning; (2) whether the place of the questioning was hostile or coercive; (3) the length of the questioning; and (4) other indicia of custody such as whether the suspect was informed at the time that the questioning was voluntary or that the suspect was free to leave or to request the officers to do so; whether the suspect possessed unrestrained freedom of movement during questioning; and whether the suspect initiated contact with the police or voluntarily admitted the officers to the residence and acquiesced to their requests to answer some questions.

The undisputed facts of this case establish that there is simply no indicia of a custodial interrogation. First, the locations of the interviews – Salvo's dormitory computer

room and the parking lot of the Burger King restaurant – can hardly be said to be hostile or coercive environments. Unlike a station-house or security room, which can be inherently intimidating, nothing in the nature of these locations could be taken to restrain Salvo's freedom or indicate he was in custody. Nor was Salvo in a confined space in which he might have felt constrained or intimidated; the computer room was large with windows facing various public areas. Furthermore, Salvo himself selected the locations for the interviews, which indicates he felt comfortable with them. Specifically with respect to the February 1996 interview, although it took place in Agent Williamson's car outside of the restaurant, this alone is not enough to convert the interview into a custodial interrogation, as this too was a very public place, and the interview was done in a non-coercive way. Indeed, it would appear that the Agent chose his car because of the sensitivity of the subject of the interview and the fact that he was showing Salvo pornographic pictures from Salvo's own computer. In this sense, it seems the Agent chose the car out of solicitude for Salvo and to save him from a more public exposure of his criminal activity, not out of a desire to coerce or intimidate him.

We also note that Salvo had complete freedom of movement during both interviews. He was never handcuffed or otherwise physically restrained, nor was he told he was under arrest or even threatened with arrest or told to "stay put." In fact, the non-custodial nature of the October 1995 interview is made abundantly clear by the fact that Salvo, at his own initiative and without being accompanied by the agents, left the computer room and went back to his room to retrieve the computer disk. This

freedom of movement, coupled with Williamson's statement to Salvo that he was not under arrest, is compelling evidence that Salvo was not in custody. *United States v. Sivils*, 960 F.2d 587, 598 (6th Cir.), *cert. denied*, 506 U.S. 843, 113 S.Ct. 130 (1992) (suspect was not in custody because he was told he was not under arrest and would not be placed under arrest at the conclusion of the interview, was not physically restrained, and remained free to move about during the interview). Clearly, if Salvo had been in custody, he would not have been allowed to walk unaccompanied by agents back to his room to retrieve his disk. Police officers intending to effectuate a custodial situation simply do not afford detainees that kind of unrestrained liberty.

Perhaps most significantly, Agent Williamson specifically advised Salvo that he was not under arrest. The agents' testimony at the suppression hearing – which Salvo did not dispute – was that Agent Williamson told Salvo at both meetings that he was not under arrest, that he was free to leave at any time, and that he would not be arrested at the conclusion of the interview. Several cases indicate that such a statement by a police officer is an important factor in finding that the suspect was not in custody. *See, e.g., Mathiason*, 429 U.S. 495 (defendant who was questioned by officer at police station was not in custody where officer informed defendant that he was not under arrest and defendant was allowed to leave at the conclusion of the interview); *Sivils*, 960 F.2d at 598 (no custody where defendant was informed before questioning began that he was not under arrest and would not be arrested at the conclusion of the interview); *United States v. Macklin*, 900 F.2d 948, 951 (6th Cir.), *cert. denied*, 498

U.S. 840 (1990) (record would not support finding that defendants were in custody where agent repeatedly told the defendants that they were not under arrest and that they were free to cut off his questioning at any point). Given the uncontradicted testimony that Agent Williamson informed Salvo he was not under arrest and was free to leave at any time, and given the non-coercive circumstances surrounding the interview, no reasonable person could view this situation as custodial or equivalent to a formal arrest.

The District Court concluded that even if Salvo "was told that he was free to go and would not be arrested at the end of the interview," Salvo was nevertheless in custody because the agents' "conduct spoke otherwise." In reaching this conclusion, the District Court relied upon several factors that purportedly support this conclusion. However, a review of these factors reveals that the District Court was more focused on what the agents knew about Salvo's activities, rather than what their actual conduct was toward Salvo and whether, as a result of that conduct, he reasonable [sic] should have felt he was in custody.

First, the District Court found that the agents "coordinated with the Boy Scout leader who terminated Salvo on the morning of October 27, 1995, for conduct related to the alleged illegal activity so that they could approach [Salvo] immediately after receiving what to him was devastating news." However, the District Court failed to show that there was any nexus between the timing of this first interview and the alleged custodial status of Mr. Salvo. While one could argue that the agents selected the timing of the interview to extract information from Salvo

while he was at an emotional low, the timing of the interview has no bearing on the question of whether a reasonable person in Salvo's position would believe that he was subject to restraints comparable to formal arrest.[4]

Rather, with regard to the first interview, the District Court stated that the agents "had substantial information that [Salvo] was engaged in illegal activity" and that they "knew the nature of the illegal activity and had some evidence of it for a significant period of time – first from the Ashland County Prosector and the Ashland County Sheriff and them from Ashland College officials." But here again, a custody determination does not depend on the subjective knowledge of the interrogating officers. *Stansbury*, 114 S.Ct. at 1529. To the extent the law enforcement officer's information and beliefs remained unarticulated throughout the interview, they have no bearing on the question of whether the suspect was in custody. *Berkemer*, 468 U.S. at 495. At the time of the first interview, the agents told Salvo they knew about Brandon, the boy he wanted to seduce, and Brian, the person he communicated with via e-mail. Aside from this information, there is no indication that Salvo was given any specific knowledge about the extent of the information the agents had acquired concerning his illegal activity, the duration of the agents' investigation, or the agents' consultation with local authorities and college officials.

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[4] Williamson claims he went to Friendly's Restaurant that day to "take any necessary steps in the best interest of the investigation" in the event that Salvo attempted to destroy evidence. Of course, Salvo did attempt to destroy, or at least conceal, evidence when he formatted his hard drive.

But, even if Salvo had been told everything the agents knew, without some additional conduct by the officers indicating a custodial situation, the state of the officers' knowledge, although possibly a factor in determining custody, does not itself determine custody. Here, although the District Court properly noted that during the first interview the agents told Salvo that they "knew about some of his alleged illegal activity and that he should cooperate with them," it did not indicate how the fact that the officers informed Salvo of this information actually led Salvo to believe he was not free to leave. It is well-settled that in order to impact upon the custody determination, the communication of these statements must somehow relate to the suspect's freedom of action.

An officer's knowledge or beliefs may bear upon the custody issue if they are conveyed, by word or deed, to the individual being questioned. [Cites omitted]. Those beliefs are relevant only to the extent they would affect how a reasonable person in the position of the individual being questioned would gauge the breath of his or her " 'freedom of action.' " [Cites omitted]. Even a clear statement from the officer that the person under interrogation is the prime suspect is not in itself, dispositive of the custody issue, for some suspects are free to come and go until the police decide to make an arrest.

Stansbury, 114 S.Ct. at 1530. While the agents' statements made it clear that Salvo was the target of a criminal investigation, Salvo's freedom of action, during and after the interview, mitigated against the possibility he would feel "in custody."

The same analysis applies with equal force to the second interview in which Agent Williamson showed Salvo the pictures seized from his computer and told Salvo that "the Assistant U.S. Attorney would be prosecuting the case" and that "things were such that maybe he should get a lawyer to have that person talk with the Assistant U.S. Attorney." Although the information imparted to Salvo in this interview made it clear that the Government would prosecute, Agent Williamson's statements to Salvo at the beginning of the interview – that he was not under arrest, that he was free to leave at the end of the interviews, and would not be placed under arrest at the conclusion of the interview – mitigated against any possibility that the statements pertaining to future prosecution could lead a reasonable person to feel as though he was in custody at that time.

In conclusion, given the totality of the circumstances in this case, we believe that Mr. Salvo was not "in custody" for the purposes of the Fifth Amendment's protections. Although the District Court's inquiry into whether a reasonable person in Salvo's position would have felt free to leave was permissible, it was not sufficient because it did not go far enough and its conclusion was not supported by the record. As the Supreme Court stated in *Mathiason*, police questioning, by its very nature, is always going to have coercive aspects to it. That does not mean, however, that a suspect is "in custody" each time he or she is questioned by a law enforcement officer. In this case, the restraint exercised by the agents never approached the level associated with either formal arrest or a coercive context tantamount to custody. Therefore, Mr. Salvo was not entitled to his *Miranda* warnings, and

the District Court's decision to suppress the statements Salvo made during the interviews is REVERSED.

B. Search and Seizure

The Fourth Amendment protects citizens against unreasonable searches and seizures. Of course, a search is not "unreasonable," and thus not violative of the Fourth Amendment, if the suspect voluntarily consents to the search. The Government bears the burden of proving the consent to search was voluntary under the totality of the circumstances. *Schneckloth v. Bustamonte,* 412 U.S. 218, 248, 93 S.Ct. 2041 (1993). This burden entails proving by "clear and positive" testimony that the consent was "unequivocal, specific, intelligently given and not influenced by any duress or coercion." *Taylor,* 956 F.2d at 573.

In the instant case, the District Court ruled that Salvo's consent to search his dorm room was involuntary:

> The court finds under all of the circumstances that the evidence seized in the search of October 27, 1995, should also be suppressed. Though consent is possible even in the context of a custodial interrogation, it must be voluntary. The Defendant admits he agreed to the search and signed the consent form but argues that he was coerced into signing. The court finds that any verbal or written consent was not voluntary. This is based on the facts and circumstances described in the context on whether Defendant was entitled to *Miranda* warnings and on the coercive nature of Agent Hayden's statements to the Defendant regarding the fact that Agent Williamson meant business and that they could do it the easy way or the hard way. All of this

> suggested that his consent was not voluntary but was coerced under threats, veiled or otherwise.

(Court order, p. 10).

Thus, the District Court's ruling was based, at least in part, on its determination that the agents had subjected Salvo to a custodial interrogation without first informing him of his *Miranda* rights. As our custody determination makes clear, Salvo was at no time in custody, and was not entitled to his *Miranda* warnings. Thus, to the extent that the District Court relied upon the circumstances which it believed created a custodial environment to find that these circumstances were coercive, we reject that finding as unsupported.

But, even if Salvo was in custody, that by itself would not be enough to vitiate an otherwise valid consent to search. *United States v. Watson*, 423 U.S. 411, 96 S.Ct. 820 (1976) (holding that suspect in police custody could voluntarily consent to a search, inasmuch as under the totality of the circumstances test, custody, standing alone, was insufficient to indicate consent was coerced). In short, because Salvo was not in custody at the time he consented to the search, the District Court erred in ruling that his custodial status contributed to the involuntariness of the search.

The District Court's second reason for finding Salvo's consent was involuntary was that Agent Hayden said "that Agent Williamson meant business and that they could do it the easy way or the hard way." (Court's Order, p. 11). The exact exchange, according to Salvo's testimony, was as follows:

Q. What occurred then?

A. One of the agents told me that, you know, I could either consent and let them search it discretely or that they could go to the courthouse, talk to the Ashland County Prosecutor, get a search warrant, and be back with uniformed police or sheriff's officers, and they would conduct the search, and I would not be allowed to be in my room.

Q. How did you feel about that?

A. I didn't want that. I was scared of the prospect.

Q. Did there come a point in time where you agreed to allow them to search the room?

A. Yes, reluctantly yes.

Q. And how did that come about?

A. At one point, Agent Williamson and I believe it was Agent Marshall, left the computer room, and I just sort of sat there, you know, with my hands in head – in my hands, and I recall Agent Hayden saying to me look, you know, he – Detective Williamson is not playing games with you, you know. He's going to search your room whether you let him or not. He gets a search warrant, its not going to be a problem. And he said it would be just a whole lot easier for you and us if you – if you consented to the search.

(Salvo Transcript, p. 55; J.A., p. 78). While the agents' testimony conradicts this account, even taking the facts as Salvo has presented them, it is evident that the conversation centered around the agents obtaining a search warrant if Salvo did not consent.

It is well-settled that the agent's statements to the effect that he would obtain a warrant if Salvo did not consent to the search does not taint Salvo's consent to a search. In *United States v. Blanco*, 844 F.2d 344, 351 (6th Cir.), *cert. denied*, 486 U.S. 1046, 108 S.Ct. 2042 (1988), this Court affirmed a district court's ruling that a consent to search was voluntary, even though the investigating agent informed the suspect that if he refused to sign a search to consent form, the agent would attempt to secure a search warrant. *See also, United States v. Watson*, 117 F.3d 1421, 1997 WL 377035, * 3 (6th Cir. (Tenn.)) (unpublished disposition), *cert. denied*, 118 S.Ct. 393 (1997) ("Notifying a person that a warrant can be obtained does not render consent involuntary unless the threat to obtain the warrant is baseless.") (citing *United States v. White*, 979 F.2d 539, 542 (7th Cir. 1992) ("When the expressed intention to obtain a search warrant is genuine . . . and not merely a pretext to induce submission, it does not vitiate consent.")); *United States v. Evans*, 27 F.3d 1219, 1231 (7th Cir. 1994) (consent to search was not tainted because agents informed consentee that they would obtain a warrant if he would not consent); *United States v. Duran*, 957 F.2d 499, 502 (7th Cir. 1992); *United States v. Hummer*, 916 F.2d 186, 190 (4th Cir. 1990), *cert. denied*, 499 U.S. 970, 111 S.Ct. 1608, abrogated on other grounds, 96 F.3d 102 (4th Cir. 1996) ("The fact that a search warrant is mentioned 'does not necessarily constitute a coercive factor negating consent.' ") (quoting *United States v. Vasquez*, 638 F.2d 507, 528-29 (2nd Cir. 1980), *cert. denied*, 450 U.S. 970 (1981)); *United States v. Kaplan*, 895 F.2d 618, 622 (9th Cir. 1990) ("consent is not likely to be held invalid where an officer tells a defendant that he could obtain a search warrant if

the officer had probable cause upon which a warrant could issue"); *United States v. Dennis*, 625 F.2d 782 (8th Cir. 1980).

In this case, Agent Williamson testified that prior to going to Salvo's room, he had sufficient information to obtain a search warrant. (Williamson Transcript, p. 41; J.A., p. 64). There is no evidence on the record that the agents' statements that they would secure a search warrant if Salvo did not consent were baseless or a pretext to coerce Salvo, and, therefore, the statements do not render Salvo's consent involuntary.

Given the other circumstances surroundings [sic] the search, such as Salvo's freedom of movement and the agents' statements that Salvo was not under arrest, and given that Salvo signed a consent form, we find that the Government has proven by clear and positive testimony that Salvo's consent was not influenced by duress or coercion. Although this Court generally gives great deference to the District Court's findings of fact regarding the issue of consent, it is clear that the District Court erred in excluding the evidence. Therefore, because the District Court's findings with regard to the voluntariness of the consent to search were clearly erroneous, we REVERSE its ruling to suppress the evidence.

VI. *CONCLUSION*

In summary, the District Court's ruling to suppress Salvo's statements because he was subjected to a custodial interrogation without first being advised of his *Miranda* rights is **REVERSED**. The District Court's ruling

that Salvo did not voluntarily consent to the search of his room is also **REVERSED**.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff v. AARON L. SALVO, Defendant	)	Case No.: 1:96 CR 352 JUDGE SOLOMON OLIVER, JR. ORDER

(Filed Feb. 27, 1997)

I. INTRODUCTION

On February 24, 1997, the court held a hearing on the motion of Defendant, Aaron L. Salvo, to suppress certain statements he made to agents of the Federal Bureau of Investigation ("F.B.I.") on October 27, 1995, and the contents of a search conducted of his room on that date as well as other statements made to F.B.I. agents in February 1996. Defendant Salvo is charged in a two-count indictment with possession of child pornography in violation of 18 U.S.C. § 2252(a)(4) and receiving child pornography by means of a computer in violation of 18 U.S.C. § 2252(a)(2). He is, and was, a student at Ashland College during the time period relevant to this motion.

The government called Agent J.R. Williamson in an attempt to establish the lawfulness of the confession and search. The Defendant also testified. Special Agent Andrew Hayden was called by the government in rebuttal.

II. THE OCTOBER 27, 1995 STATEMENTS AND SEARCH

A. Agent Williamson

Agent Williamson has been employed as a special agent for the F.B.I. for almost 13 years. He is assigned to the Cleveland Division and works out of an office in Mansfield. He testified that on or about August 8, 1995, he became involved in an investigation which led to the indictment of the Defendant in this case. He was contacted by the Ashland County Sheriff's Department and Prosecutor's Office. He related that he was made aware of the fact that officials at Ashland College, where the Defendant attended, had previously notified the Sheriff's Office of a possible illegal use of the Internet by the Defendant and another person.

Mr. Williamson was made aware that Mr. Salvo was communicating by E-mail regarding child pornography and the possible seduction of young boys. In those communications, Mr. Salvo indicated he was a life guard at a boy scout camp and that he had requested guidance on how to seduce one of the boys at that camp. Copies of these communications were provided to the F.B.I., and Ashland Sheriff's Department and the Prosecutor's Office gave detailed background information to the F.B.I.

Armed with this information Special Agent Williamson contacted the Boy Scouts on August 8, 1995. After he became aware that the local prosecutors who were looking at the child molestation portion of the case determined that no Boy Scouts were in danger, he postponed a full investigation until October 1995. Prior to October 27, 1995, he interviewed an official from the

College, who supplied him with copies of the same E-mail messages that the Sheriff and County Prosecutor's Office had provided them. This official also informed Mr. Williamson of the dormitory where Mr. Salvo lived. On October 26, 1995, Mr. Williamson was informed by Barry Norris, a person in charge of Boy Scouts of America in Mansfield that Mr. Norris would be meeting with Mr. Salvo at 7:30 at a Friendly's Restaurant near the campus to remove him from the Boy Scouts. Though Mr. Williamson was not part of the meeting, he was at the Friendly's Restaurant to observe it. When the meeting was concluded, according to Mr. Williamson, he followed Mr. Salvo on foot to the vicinity of his dormitory where he identified himself by name and as an F.B.I. agent, told him he was conducting an investigation and asked to speak with him. When Mr. Salvo agreed to speak with him, he radioed for two other agents, who he knew were nearby and prepared to assist. He then asked Mr. Salvo where they might meet and Mr. Salvo identified a computer room. The room was locked but Mr. Salvo found someone to open it. The room was approximately 15 x 30 and had glass windows that looked to the outside and inside. No one else was present but the agents and Mr. Salvo. According to Mr. Williamson, the agents told him he was not under arrest, he was free to leave, he did not have to talk to them, and they were conducting an investigation involving possible violations dealing with child pornography. When Mr. Salvo denied any knowledge, they told him they were aware of the E-mail messages between himself and another person and they would like to talk with him about the investigation. Agent Williamson described Mr. Salvo as nervous, but in control.

Mr. Williamson and another agent interviewed the Defendant and a third agent, Agent Hayden, who was in his probationary period, observed and took notes. The agents did not give Mr. Salvo his *Miranda* warnings because they did not believe it to be a "custodial situation." During the course of the interview, the Defendant made certain admissions regarding the investigation, including the fact that he had communicated by Internet with another subject under investigation, and that he had traded in pornographic pictures with this person. He also admitted he had certain pornographic pictures on his disk which he would provide. The agents also sought consent to search his room. Mr. Salvo initially indicated his roommate was asleep in the room but that he would go to his room and obtain the disk. Mr. Salvo went to his room and came back with the disk. According to Agent Williamson, Mr. Salvo then indicated his roommate was no longer in the room. The agent again asked if they could search his room, informing him that he was free to consent or not consent. He did consent and signed a consent form provided by the agents. A search was conducted and certain items were seized. The agents determined that the hard drive on his disk had been formatted, which meant it was put in a form where information could not be easily retrieved. This was done in an effort to conceal information stored on his computer which might be damaging to him. When confronted, Mr. Salvo admitted this and indicated that he had formatted the disk on the hard drive of his computer earlier while he came up to retrieve the disk previously furnished to them. The agents seized the computer and the contents of the computer. The F.B.I. laboratory in Washington retrieved the formatted information.

After he inquired, the agents discussed with Mr. Salvo the possible penalties he faced during the search of his room. He was told by Mr. Williamson he could be looking at some time or he could "skate", depending on the decision of the Assistant U.S. Attorney.

B. Defendant Salvo

Mr. Salvo testified that Mr. Norris, the Boy Scout leader, had not told him what the purpose of their meeting would be on October 27, 1995. When he arrived at Friendly's that morning, not many people were there and Mr. Williamson sat at a table near theirs, though he did not know Mr. Williamson at the time.

Mr. Salvo indicated that at the meeting at Friendly's, Mr. Norris told him he was discharged from the Boy Scouts but would not tell him the reason, indicating that he knew what was going on. When Agent Williamson approached him in the vicinity of his dormitory, he recognized him from the restaurant. He indicated that Agent Williamson told him who he was, and that he wanted to ask him a few questions. He further stated, contrary to the testimony of Agent Williamson, that the agent told him at that time that he was conducting an investigation concerning trafficking in child pornography. As indicated previously, Agent Williamson testified that he did not tell him the purpose of the investigation until the beginning of the interview in the computer room. Mr. Salvo indicated he said nothing, put his head in his hands and got sick to his stomach. This is also somewhat contradictory of Agent Williamson's testimony, who said the Defendant agreed to talk.

The agent radioed for the two other offices [sic] who came. Agent Williamson asked if there was some place private they could go so the agents could question him. Contrary to Agent Williamson's assertion, Defendant maintains the agents suggested he be interviewed in the dormitory room, but the Defendant told them his roommate was sleeping.

The agents interviewing him were three or four feet away; they were between him and the door. After identifying themselves, they told him they knew about Brandon, the young boy he allegedly wished to seduce and Brian, the person with whom he communicated by E-mail; they knew what he had been doing and were investigating. One agent is said to have stated "you've been led astray, we're just trying to help you out, to see what's going on." Mr. Salvo indicated he was distraught at this time. He told the agents he wanted his life back and did not want to go to prison. He indicated that they said, "we expect you to skate." At one point, Agent Hayden is said to have stated, "Whoa, nobody's talking about prison . . . no one's talking about prison right now." The Defendant also stated that the agents told him at one point "just cooperate with us and everything will work out."

Contrary to Agent Williamson's account, Defendant Salvo indicated that when he came back from retrieving the disk, the agents indicated they would like to search his room; he did not volunteer his roommate was no longer there. He told them his roommate was still there, though he was not at the time. The agents persisted, indicating that if he did not consent, they would go to the Ashland County Prosecutor and get a warrant and come

back with uniformed police or persons from the Sheriff's office to search; he would not be allowed in the room. The agents admit they talked about obtaining a search warrant but deny they would obtain one from the local Ashland County authorities. At one point Agent Hayden, along with the Defendant in the computer room, told Defendant Salvo that Agent Williamson was not playing games and that he was going to search the room whether you let him or not. He stated it would be a whole lot easier for you and us if you – if you consented to the search. Agent Hayden agreed he had a conversation with Defendant in an effort to persuade him to consent but did not agree that he said precisely what Defendant claims. When the two other agents returned to the room, Mr. Salvo agreed to the search. He maintains he felt he had no option. He says he was not advised of what the penalty was for having the material seized.

Mr. Salvo testified he met with Agent Williamson again the next day to give him his social security number, birth date, and his parents' names and addresses. His next face-to-face contact was with the agent in February. Prior to that in a telephone conversation in November 1995, he was told by the agent he didn't think the Assistant U.S. Attorney would be prosecuting the case.

III. THE FEBRUARY 1996 STATEMENTS AND SEARCH

A. Agent Williamson

Agent Williamson indicated his next contact with Mr. Salvo after the October 27, 1995, meeting was in February 1996, though he spoke with him on the telephone several times. In December 1995, Mr. Salvo called him as he had been requested to do by the agent regarding another E-mail message from the person he had been communicating with and provided it to the F.B.I. After reviewing the reformatted material received from the F.B.I. lab, Mr. Williamson arranged a meeting with Mr. Salvo to discuss certain graphic images that were obtained and to re-interview him to see if his story had changed. They met at a Burger King Restaurant in Ashland, where the Defendant was interviewed. The agent determined that the restaurant was not a good place to show the pictures to him; consequently, the pictures were shown to him in the police car. According to the agent, Mr. Salvo was told prior to the meeting he was not under arrest, he was free to leave at any time and that he would not be arrested at the end of the interview. He was not given *Miranda* warnings but Mr. Williamson suggested he obtain a support group – tell his parents, retain an attorney, or if he could not afford one, one could possibly be appointed for him. On each occasion, the Defendant indicated that he did not want an attorney or to involve other people.

B. Mr. Salvo

In February 1996, Agent Williamson contacted him to tell him the case was going to be prosecuted and that he wished to interview him again. Mr. Salvo cooperated,

feeling he had no choice but cooperate [sic]. He states that he was never urged to get an attorney, though he was encouraged to tell his parents what was going on.

C. Agent Hayden

Special Agent Andrew Hayden, who has been with the F.B.I. for approximately 1½ years, testified on rebuttal that he was present at both the October 27 and February meetings with Mr. Salvo. He confirmed Agent Willamson's testimony that the Defendant was told he was free to come and go at any time during each interview and would not be placed under arrest at the conclusion of the interview. He admitted that he was alone with the Defendant in the computer room at one time and that he had a conversation with the Defendant. He told the Defendant that they were there for real purposes, that this was a serious matter and "his cooperation would be appreciated."

IV. DISCUSSION

The issues in this case are (1) whether or not the statements of the Defendant taken on October 27, 1995, and thereafter should be suppressed because they were taken in violation of his Fifth Amendment rights against self-incrimination as guaranteed by *Miranda v. California*, 384 U.S. 436 (1966) and (2) whether or not the evidence seized on October 27, 1995, from Defendant's room was taken in violation of his Fourth Amendment rights against illegal searches and seizures.

In order to trigger the requirement to give *Miranda* warnings, a suspect must be subjected to custodial interrogation. *Miranda v. Arizona*, 384 U.S. at 477-78. In determining whether custody exists, a court must look at the totality of the circumstances involved, including the perception of a reasonable person in the suspect's position. *Berkemer v. McCarty*, 468 U.S. 420, 442. If *Miranda* procedural safeguards are required:

> Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has the right to the presence of an attorney, either retained or appointed.

Id. at 444-45.

Whether consent to search is voluntary must be determined from all the circumstances. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

In the within case, the court has determined, after looking at the totality of circumstances, that all statements made by Defendant to the agents on October 27, 1995, and thereafter should be suppressed. A reasonable person in the suspect's shoes would believe that he was in custody when these statements were made, that he was being accused of committing a crime and was not free to go. This is so even if the Defendant was told that he was free to go and would not be arrested at the end of the interview. Here, the agents had substantial information that this Defendant was engaged in illegal activity. They knew the nature of the illegal activity and had some evidence of it for a significant period of time – first from the Ashland County Prosecutor and the Ashland County

Sheriff and then from Ashland College officials. They coordinated with the Boy Scout leader who terminated him on the morning of October 27, 1995, for conduct related to the alleged illegal activity so that they could approach the Defendant immediately after receiving what to him was devastating news. This situation, together with agents telling him that they knew about some of his alleged illegal activity and that he should cooperate with them could lead him to reasonably believe that he was indeed not free to go despite the possible assertions by the officers to the contrary. Their conduct spoke otherwise. This is true in regard to the October 27, 1995, and the February 1996, interview, even though the court admits that the legality of the October 27, 1995, interrogation presents a close question. This is not so with the February 1996, interview. Here he was told that the Assistant U.S. Attorney would be prosecuting the case. The Defendant was asked to meet with the agents and give another statement. He was also told, according to the agent, things were such that maybe he should get a lawyer to have that person talk with the Assistant U.S. Attorney. A reasonable person in the suspect's situation would, under the totality of the circumstances, feel that he was in custody and was not free to go. It is the underlying coercive nature of custodial interrogation which *Miranda* warnings were designed to address.

The court finds under all of the circumstances that the evidence seized in the search of October 27, 1995, should also be suppressed. Though consent is possible even in the context of a custodial interrogation, it must be voluntary. The Defendant admits he agreed to the search and signed the consent form but argues that he was

coerced into signing. The court finds that any verbal or written consent was not voluntary. This is based on the facts and circumstances described in the context on whether Defendant was entitled to *Miranda* warnings and on the coercive nature of Agent Hayden's statements to the Defendant regarding the fact that Agent Williamson meant business and that they could do it the easy way or the hard way. All of this suggested that his consent was not voluntary but was coerced under threats, veiled or otherwise.

V. CONCLUSION

For those reasons, the statements given by the Defendant to the F.B.I. agents on October 27, 1995, and thereafter should be suppressed as being in violation of the Fifth Amendment. Warnings should have been given. The court also suppress [sic] the evidence seized from the search of Defendant's computer as being in violation of the Fourth Amendment. The consent obtained was coerced and therefore not lawful.

IT IS SO ORDERED.

/s/ Solomon Oliver, Jr.
UNITED STATES DISTRICT JUDGE

CONSTITUTIONAL PROVISIONS

FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTORY PROVISIONS

Title 18 U.S.C. 2252(a)(2)

(a) Any person who –

(2) knowingly receives, or distributes, any visual depiction that has been mailed, or has been

shipped or transported in interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by an means [sic] including by computer, or knowingly reproduces any visual depiction for distribution in interstate or foreign commerce by any means including by computer or through the mails, if –

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

shall be punished as provided in subsection (b) of this section.

Title 18 U.S.C. 2252(a)(4)

(a) Any person who –

(4) either –

(B) knowingly possesses 3 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction that has been mailed, or has been shipped or transported in interstate or foreign commerce, or which was produced using materials which have been mailed or so shipped or transported, by any means including by computer, if –

(i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(ii) such visual depiction is of such conduct;

shall be punished as provided in subsection (b) of this section.